APEX PHARMACY HOLDINGS SDN. BHD.

v.

CHEE CHIN

FEDERAL COURT, KOTA BHARU
SALLEH ABAS LP
WAN SULEIMAN FJ
HASHIM YEOP SANI FJ
[CIVIL APPEAL NO. 303/1983]
13 JULY 1984

LANDLORD AND TENANT: *Lease - Contract with defendant - Defendant not registered owner of premises - Whether false misrepresentation - Defendant not native of Kelantan - Lease in contravention of s. 104(1), Kelantan Land Enactment - Effect - New tenancy agreement - Whether validly rescinded - Damages.*

CIVIL PROCEDURE: *Pleadings - Whether sufficient - Order 14, Subordinate Courts Rules - Allegation of false misrepresentation - Whether inconsistent with pleadings - Absence of particularisation of land - Whether fatal.*

The appellant sued the respondent in the Sessions Court at Kota Bharu for the refund of a sum of RM15,000 paid as premium under an agreement for a lease dated 6 February 1980. The claim was based on:

(a) false misrepresentation by the respondent that he was the registered owner of the premises when he was not; and

(b) failure on the part of the respondent to give possession of the premises on the date agreed upon.

The President of the Sessions Court dismissed the claim on the ground, *inter alia*, that the evidence adduced by the appellant had departed from the pleadings and had brought a new cause of action inconsistent with the pleadings. On the appellant appealing to the High Court, the Judge dismissed the appeal on the ground that the cause of action was not fraudulent misrepresentation but the failure of the respondent to give possession of the premises as promised and that the claim was not supported by the evidence advanced at the trial. The appellant appealed further.

Held:

[1] The pleadings were sufficient to support a relief.

(a) The statement of claim complied sufficiently with the requirements of O. 14 of the Subordinate Court Rules.

(b) Regarding the allegation of false misrepresentation the evidence adduced at the trial was not really inconsistent with the pleadings. The absence of particularisation of fraud was not fatal in the circumstances.

[2] The agreement of 6 February 1980, purporting to grant a lease was void and of no effect. The agreement was for the purpose of deceiving a public authority. The respondent was not a native of Kelantan. Nor was he the registered proprietor under the National Land Code at the material time, but had described himself as a proprietor in order to circumvent the provisions of s. 104(1) of the Kelantan Land Enactment.

[3] The agreement of 6 February 1980, did not constitute a valid monthly tenancy.

[4] The subsequent agreement expressed in the various letters exchanged between the parties was validly rescinded by the appellant on 18 November 1980.

[5] The appellant was entitled under s. 66 of the Contracts Act to a refundment of the premium.

[6] The claim for damages however must be dismissed. The claim for damages in respect of the void agreement did not arise and that in respect of the subsequent agreement had not been supported by satisfactory evidence.

[Appeal allowed.]

Cases referred to:
Arkwright v. Newbold [1880] 17 Ch D 301
Lee Pooi Chun v. Lee Kah Gee [1971] 2 MLJ 67
Palaniappa Chettiar v. Arunasalam Chettiar [1962] MLJ 143
Margaret Chua v. Ho Swee Kiew & Ors. [1961] 27 MLJ 173
Parker v. Taswell 2 De G & J 559

Legislation referred to:
Land Enactment 1938 (Kelantan), s. 104, (1)
Contracts Act 1950, ss. 66, 76
Subordinate Courts Rules 1980, O. 14

Other source referred to:
Chitty on Contracts 23rd Edn. p. 131

For the appellant - Wrigglesworth; M/s. Wrigglesworth & Co.
For the respondent - Jegathesan; M/s. Jegathesan & Co.

JUDGMENT

Hashim Yeop Sani FJ:

The appellant, Apex Pharmacy Holdings Sdn. Bhd., sued the respondent in the Sessions Court at Kota Bharu for the refundment of a sum of RM15,000 paid as premium under an agreement for a lease dated 6 February 1980. The learned President of the Sessions Court dismissed the claim with costs. The appeal before the learned Judge of the High Court Kota Bharu was also dismissed with costs.

The statement of claim before the Sessions Court described what was thought to be the issues sought to be tried. The first issue was stated in para. 4 and the second issue was stated in paras. 6 and 7 of the statement of claim. For convenience these paragraphs are reproduced below:

> 4. The defendant was not the registered owner of the said premises but falsely misrepresented himself to be so in the said agreement.
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> 6. Under the terms of Clause 1 of the said agreement the tenancy was to begin on the 1 April 1980 but the defendant was not able to give possession of the said premises to the plaintiff on the said date as provided under the terms of the said agreement.
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> 7. The failure of the defendant to give possession of the said premises to the plaintiff on the said date has caused the plaintiff great expense and loss in business resulting from the plaintiff having to make alternative arrangements for the lease of other premises with consequential delay in commencing business.

The defence's answer to these issues on the pleadings was as follows. Firstly it was contended that the plaintiff company knew that the defendant was the de *facto* owner of the premises and the *de jure* owner of the premises was merely holding the premises for the defendant "with the view to circumvent the provision of s. 104 of the Kelantan Land Enactment No. 26 of 1938". Secondly the defendant delivered vacant possession of the premises to the plaintiff soon after the execution of the agreement and maintained that it was the plaintiff company that breached the contract.

If the agreement is void then by virtue of s. 66 of the Contracts Act the appellant would be entitled to the refundment of RM15,000. If the agreement is voidable then if it is voidable at the option of the appellant then by virtue of s. 76 of the Contracts Act the appellant would be entitled to damage and the refundment of the RM15,000.

The director of the appellant company (PW1) testified that with the help of his lawyer (PW2) he entered into an agreement (AB3-11) with the respondent on 6 February 1980. It was expressly stated as an agreement for a lease for a period of ten years commencing from 1 April 1980 at a monthly rental of RM1,200 payable in advance on the 1st of each month. The preamble of the agreement cited the "First Party" (the respondent) as "the registered owner of the premises" which statement was subsequently admitted to be false. On executing the agreement PW1 paid a premium of RM15,000 to the respondent. The learned President after hearing the evidence found *inter alia* that the evidence adduced by the plaintiff had departed from the pleadings and had brought a new cause of action inconsistent with the pleadings.

On appeal to the High Court the learned Judge dismissed the appeal because he was of the opinion that the cause of action was not fraudulent misrepresentation but that the plaintiff was not given possession of the premises as promised and this claim was not supported by the evidence adduced at the trial.

We will now deal with the points raised. Firstly, on the question of pleadings. We are of the opinion that the statement of claim complied sufficiently with the requirements of O. 14 of the Subordinate Court Rules. As regard the allegation of false misrepresentation we are of the opinion that the evidence adduced at the trial were not really inconsistent with the pleadings. We do not think that the absence of particularisation of the fraud is fatal in the circumstances. We also do not think that the respondent had been taken by surprise or unable to meet the appellant's case. It is our view that the pleadings are sufficient to support a relief. It would seem to us that the statement of claim ought to be regarded as a case of rescinding a contract as an alternative to an action for deceit.

It is essential in law that if misrepresentation is to have legal effect it should have operated on the mind of the representee, and the burden of proving this lies on the representee himself in this case, PW1. See also judgment of Lush LJ in *Arkwright v. Newbold* [1880] 17 Ch. D. 301 @ 328. In this case PW1 himself said he was "never misled" (p. 19). It follows that if the misrepresentation did not affect the representee's mind, because he was unaware that it had been made, or because he was not influenced by it, or because he knew that it was false, he has no remedy. See also *Chitty on Contracts*, 23rd Edn. p. 131. Thus one may find it odd for PW1 to elect to sue on the grounds of alleged false misrepresentation. This, however, was explained by him in his own evidence (at p. 19) that it was only after taking another premises that he decided "to fall back on the point" that the respondent had misled him.

It was also contended by the appellant that the agreement was void because the respondent described himself falsely in the agreement as the registered owner of the premises in order to circumvent the provisions of s. 104(1) of the Kelantan Land Enactment. There is here a self-admitted attempt to defraud a public authority. According to s. 104(1) of the Enactment,

the Land Registrar shall refuse to register a lease of land by a native of Kelantan to a party who is not a native of Kelantan until the transaction has received the sanction of His Highness the Sultan in Council. Any such lease without the previous sanction of His Highness the Sultan in Council shall be null and void. The respondent was not the registered owner of the land during the material period and that it is not disputed that the respondent is not a native of Kelantan.

We feel that the issue here is simple enough. The agreement purports to grant a lease for ten years. It is a fact that the respondent was not the registered proprietor under the National Land Code at the material time and therefore not one qualified to grant a lease under the Code. Since the respondent was not a person qualified to grant a lease and since the agreement was for the avowed purpose of deceiving a public authority, the agreement must be regarded as void and of no effect.

The attitude of the Courts in such matter has been consistent. In *Lee Pooi Chun v. Lee Kah Gee* [1971] 2 MLJ 67, the Federal Court refused to recognise any legal right of the claimant because the written agreement was made with the view to evade the land control law and therefore the claimant was practising a deceit on the public administration. See also *Palaniappa Chettiar v. Arunasalam Chettiar* [1962] MLJ 143 where the respondent had practised deceit on the public administration for his personal gain. Under s. 66 of the Contracts Act the appellant is accordingly entitled to a refundment of the premium.

Another point raised is that the Court should regard the agreement (AB3-11) as a valid tenancy on a month-to-month basis. The principle relied on is that when a purported lease is construed as an agreement it goes without saying that as between the parties the agreement is enforceable just as any valid contract for land dealing. It may be specifically enforced. If in the circumstances of the case the Court would not order specific performance the agreement may form the basis of a claim for damages or breach of contract.

But we would hasten to point out that unlike the appellant in *Margaret Chua v. Ho Swee Kiew & Ors.* [1961] 27 MLJ 173, who was at all material times the registered proprietor of the land, the respondent here was not and that the device used by him in the agreement was for the purpose of deceiving the state authority. In *Margaret Chua* the trial Judge was of the opinion (and the Court of Appeal agreed with him) that although the agreement might be a nullity as a lease it could be a good enforceable agreement for a lease under which the appellant as registered proprietor had undertaken the obligation to grant a lease. That judgment followed a long line of authorities (see *Parker v. Taswell* 2 De G. & J. 559).

The evidence in this case however showed that the basis of the relationship of landlord and tenant was formed after the repudiation by respondent (AB12) and the various correspondences and admissions in Court.

Let us recapitulate. On 22 May 1980 PW1 received a letter (AB12) from the respondent's solicitors dated also 22 May 1980 informing him that the respondent was not the registered owner of the premises but that the true and proper owner of premises was one Chan Kim Heng of No. 2723 Jalan Tok Hakim, Bandar Kota Bharu, Negeri Kelantan. This person later gave evidence as DW3 admitting this fact. However PW1 in spite of the notice (AB12) still continued to rely on the agreement - p. 18. The agreement had provided that the tenancy would commence from 1 April 1980. Subsequently this commencement of the tenancy was extended on three occasions by correspondence AB14, AB16, AB17 to 25 July 1980 and then finally to 31 August 1980. PW1 sent the notice to rescind the contract on 18 November 1980. It was expressly stated in that letter that up to that date the premises was still not ready for occupation. Both the learned President and the learned Judge held however that

the respondent was not to blame if PW1 found that electricity supply was inadequate for the purposes of the appellant's use. But in our view this finding is contrary to all the evidence properly considered. For the respondent, in his own evidence, admitted that the delay in commencing the tenancy was because there was no electricity (p. 24). When referred to the notice to rescind the agreement, respondent said (p. 25):

> AB18 is a notice rescinding the tenancy agreement I gave AB18 to my solicitor. The electricity was in early part of November '80.
>
> After electricity was installed PW1 came to see me. He told me that the electricity was not enough.

On the evidence it is clear that until November 1980 no electricity supply at all was available at the premises concerned. As stated in the letter to the appellant dated 27 November 1980 (p. 118) the respondent notified the appellant that only then "the premises is now ready for occupation, electricity having been installed". Thus as seen from the evidence it is absolutely clear that the sole reason for the delay was the installation of electricity into the premises. The question of inadequacy of electricity came later.

Thus it may be true that the respondent did not know how much electricity was required by the appellant in the premises until November 1980 but there is no evidence to show that even the normal supply of electricity was available before 27 November 1980. What is clear from the evidence is therefore the following:

(a) the appellant had agreed to extend the time of commencement of the tenancy up to but not later than 31 August 1980;

(b) the respondent admitted in the letter dated 27 November 1980 that the premises was ready for occupation only then.

To summarise, the agreement expressed in the various letters exchanged between the parties after the notice of repudiation (AB12) by the respondent was that the parties agreed to have a tenancy commencing from 1 April 1980 and extended finally by mutual consent to 31 August 1980 conditional upon installation of electricity into the premises. It has been established beyond doubt both by letter dated 27 November 1980 and the respondent's own testimony that the respondent was unable to have electricity installed until November 1980. There is therefore no doubt that the appellant was entitled to rescind the agreement on 18 November 1980.

As regard the claim for damages, the claim for damages in respect of the void agreement does not arise. In any case the appellant have themselves to blame to continue to deal with the respondent knowing that he was not the registered owner. The claim for damages in respect of the subsequent agreement has not been supported by satisfactory evidence. PW 1 only said he had "incurred RM2,200 as expenses". This bare statement cannot be a satisfactory basis for an award of damages in the circumstances of the case. The claim for damages is accordingly dismissed.

There shall be an order of 8% per annum interest on the sum of RM15,000 from the date of judgment of the learned President (1 August 1980).

Appeal is allowed with costs to the appellant here and the Court below.

Also found at [1984] 2 CLJ 266